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No. 15150

United States
Court of Appeals
for the Ninth Circuit

GLENN WEIBLE and PATRICIA WEIBLE,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

Transcript of Record

Appeal from the United States District Court for the
Southern District of California,
Central Division.

FILED

AUG 23 1956

PAUL P. O'BRIEN, CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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United States District Court for the Southern
District of California, Central Division

Civil Number 15717-T

GLENN WEIBLE and PATRICIA WEIBLE,
Plaintiffs,

vs.

UNITED STATES,
Defendant.

COMPLAINT, REFUND OF TAXES

For a First Cause of Action, Plaintiff, Glenn
Weible, Alleges:

1. Jurisdiction is conferred on the Court by Title 28, United States Code, Sections 1340 and 1346; the total amount of the claims of plaintiffs, Glenn and Patricia Weible, do not exceed Ten Thousand Dollars (\$10,000.00); the action arises under the Internal Revenue Code, more particularly Sections 322 and 3772 thereof.

2. On or about March 15, 1948, plaintiff filed with the Collector of Internal Revenue for the Sixth District of California a Federal Individual Income Tax Return for the taxable year ended December 31, 1947, and concurrently therewith paid to the Collector of Internal Revenue the amount of \$1,320.13 in Federal Individual Income Taxes for that year.

3. Claim for Refund was filed with the Collector of [2*] Internal Revenue for the Sixth District of California on January 31, 1951, for the amount of \$696.13 on the ground that plaintiffs' Federal Income Tax for said taxable year had been overpaid to that extent. A copy of said claim is attached hereto as Exhibit "A" and by reference incorporated herein.

4. This claim was disallowed by the Collector of Internal Revenue and notice of said disallowance was given to plaintiff by registered mail, dated March 27, 1952; more than six (6) months have elapsed since the claim was filed.

5. The facts upon which plaintiff based said claim and upon which this cause of action is founded are as follows:

(a) Plaintiff at all times mentioned herein was a citizen of the United States;

(b) In September, 1945, plaintiff was employed by Max Factor and Co., a domestic corporation, as its representative to train personnel in foreign branches of said employer, and to organize and supervise the establishment in foreign countries of cosmetic manufacturing plants for said employer. Plaintiff entered into an employment contract with said employer, wherein he agreed to remain permanently outside of the United States in the performance of his duties, except for occasional short periods of training and consultation.

*Page numbering appearing at foot of page of original Certified Transcript of Record.

(c) In June, 1946, after a period of training, plaintiff was sent by his employer pursuant to his contract of employment to Australia for the purpose of establishing a manufacturing plant in that country for his employer. No definite period of time was established by either plaintiff or his employer for the completion of plaintiff's assignment in Australia, but on the contrary, plaintiff agreed to remain in that country for an indefinite period of time and until such assignment was [3] completed. Plaintiff's assignment in Australia was of such a nature that an extended stay in Australia was necessary for its accomplishment. Plaintiff resided in Australia from June, 1946, until October, 1948, with the intent to reside in Australia for an indefinite period of time and until said assignment was completed. Plaintiff was a bona fide resident of Australia during the entire year 1947.

(d) The amount of Six Hundred Ninety-six and 13/100 Dollars (\$696.13) for which plaintiff claims refund is the amount of Federal Income Tax attributable to that part of plaintiff's income in the year 1947 which consisted in its entirety of salary paid to plaintiff Glenn Weible by said employer for personal services actually rendered by plaintiff Glenn Weible to said employer in Australia.

6. The denial of plaintiff's Claim for Refund in the amount mentioned in paragraph 3 hereof was erroneous and illegal; plaintiff was and is entitled to have a refund of said amount paid with interest thereon.

7. Plaintiff's said claim for refund has not been satisfied in whole or in part and the total amount mentioned above is now due and owing from defendant.

For a Second Cause of Action, Plaintiffs Glenn and Patricia Weible Allege:

1. Paragraph 1 of the First Cause of Action of plaintiff Glenn Weible is hereby incorporated by reference as though fully set forth herein.

2. On or about March 15, 1949, plaintiffs filed with the Collector of Internal Revenue for the Sixth District of California a Federal Individual Income Tax Return for the taxable year ended [4] December 31, 1948, and concurrently therewith paid to the Collector of Internal Revenue the amount of Nine Hundred Eighty-three and 96/100 Dollars (\$983.96).

3. Claim for refund was filed with the Collector of Internal Revenue for the Sixth District of California on January 31, 1951, for the amount of \$983.96 on the ground that plaintiffs' Federal Income Tax for said taxable year had been overpaid to that extent. A copy of said claim is attached hereto as Exhibit "B" and by reference incorporated herein.

4. This claim was disallowed by the Collector of Internal Revenue and notice of said disallowance was given to plaintiff by registered mail dated

March 27, 1952; more than six (6) months have elapsed since the claim was filed.

5. The facts upon which plaintiff based said claim and upon which this cause of action is founded are as follows:

(a) Plaintiff Glenn Weible was at all times herein mentioned a citizen of the United States; plaintiff Patricia Weible at all times herein mentioned was a citizen of Australia.

(b) Plaintiffs were married in 1948 in Australia and have been married since that time.

(c) Plaintiffs refer to paragraph 5(b) of the First Cause of Action of plaintiff Glenn Weible and by reference incorporates it herein.

(d) From June, 1946, until October, 1948, plaintiff Glenn Weible, pursuant to said employment contract, was employed in Australia for the purpose of establishing a manufacturing plant in that country for his employer. No definite period of time was established by either plaintiff or his employer for the completion of said assignment, but, on the contrary, plaintiff agreed to remain in that country for an indefinite period of time and until [5] said assignment was completed. The nature of his assignment in Australia was such that an extended stay was necessary for its completion. At the time plaintiff Glenn Weible commenced his assignment in Australia he agreed with his employer that upon the completion of such assignment he would be transferred on a similar assignment to some country

other than the United States and that such similar assignment would be for an indefinite period and of such a nature that an extended period of time would be required for its completion.

During the period June, 1946, to October 15, 1948, plaintiffs resided in Australia with the intent to remain there indefinitely, and during such period plaintiffs were bona fide residents of Australia.

(e) On October 15, 1948, plaintiff Glenn Weible was instructed by his employer to return to the United States for a retraining period preparatory to his assignment to Canada for the purpose of establishing a manufacturing plant for his employer in Canada. Plaintiff Glenn Weible agreed to accept said assignment and to remain in Canada for an indefinite period of time until the completion of said assignment. The nature of said assignment in Canada was such that an extended stay in Canada was necessary for its accomplishment. From October 15th to October 29th, plaintiffs remained in the United States while plaintiff Glenn Weible received training preparatory to his assignment in Canada. From October 29, 1948, until July, 1949, plaintiffs resided in Canada with intent to remain there indefinitely and until plaintiff Glenn Weible's assignment in that country should be completed. At all times during the taxable year 1948 [6] plaintiffs were bona fide residents of either Australia or Canada.

(f) All of the income of plaintiffs in 1948 consisted of salary paid to plaintiff Glenn Weible by

said employer for personal services actually rendered by plaintiff Glenn Weible to said employer in Australia and Canada.

6. The denial of plaintiffs' claim for refund in the amount mentioned in paragraph 3 hereof was erroneous and illegal; plaintiffs were and are entitled to have a refund of said amount paid with interest thereon.

7. Plaintiffs' said claim for refund has not been satisfied in whole or in part, and the total amount mentioned above is now due and owing from defendant.

For a Third Cause of Action, Plaintiffs Glenn and Patricia Weible Allege:

1. Paragraph 1 of the First Cause of Action of plaintiff Glenn Weible is hereby incorporated by reference as though fully set forth herein.

2. On or about March 15, 1950, plaintiffs filed with the Collector of Internal Revenue for the Sixth District of California a Joint Federal Individual Income Tax Return for the taxable year ended December 31, 1949, and concurrently therewith paid to the Collector of Internal Revenue the amount of One Thousand Three Hundred and Five and 70/100 Dollars (\$1,305.70).

3. Claim for refund was filed with the Collector of Internal Revenue for the Sixth District of California on January 31, 1951, for the amount of One Thousand Three Hundred and Five and 70/100

Dollars (\$1,305.70) on the ground that plaintiff's Federal Income Tax for said taxable year had been overpaid to that extent. A copy of said claim is attached hereto as Exhibit "C" and by [7] reference incorporated herein.

4. This claim was disallowed by the Collector of Internal Revenue and notice of said disallowance was given to plaintiffs by registered mail dated March 27, 1952; more than six (6) months have elapsed since the claim was filed.

5. The facts upon which plaintiffs based said claim and upon which this cause of action is founded are as follows:

(a) Plaintiff Glenn Weible was at all times herein a citizen of the United States; plaintiff Patricia Weible at all times mentioned herein was a citizen of Australia.

(b) Plaintiffs were married in 1948 in Australia and have been married since that time.

(c) Plaintiffs refer to paragraph 5(b) of the First Cause of Action of plaintiff Glenn Weible, and to paragraphs 5(d) and 5(e) of the Second Cause of Action, and by reference incorporate them herein.

(d) In July, 1949, plaintiff Glenn Weible was instructed by his said employer to proceed directly to the British branch of his employer to assist in the training of supervisory and factory personnel in methods and procedures for the manufacture of

cosmetic requisites in Great Britain. Plaintiff Glenn Weible agreed to accept said assignment and to remain in Great Britain for an indefinite period of time until the completion of said assignment. The nature of said assignment in Great Britain was such that an extended stay was necessary for its accomplishment. Plaintiffs resided in Great Britain throughout the year 1949 and until December, 1950, with the intent to remain in Great Britain for an indefinite period of time. At all times during the taxable year 1949, plaintiffs were bona fide residents of either Canada or Great Britain. [8]

(e) All of the income of plaintiffs in the taxable year consisted of salary paid to plaintiff Glenn Weible by said employer for personal services actually rendered by plaintiff Glenn Weible to said employer in Canada and England.

6. The denial of plaintiffs' claim for refund in the amount mentioned in paragraph 3 hereof was erroneous and illegal; plaintiffs were and are entitled to have a refund of said amount paid with interest thereon.

7. Plaintiffs' said claim for refund has not been satisfied in whole or in part, and the total amount mentioned above is now due and owing from defendant.

Wherefore, plaintiffs pray:

(1) Judgment for recovery by plaintiff Glenn Weible against defendant in his First Cause of

Action of \$696.13, with interest thereon as provided by law.

(2) Judgment for recovery by plaintiffs Glenn Weible and Patricia Weible against defendant in their Second Cause of Action of \$983.96 with interest thereon as provided by law.

(3) Judgment for recovery by plaintiffs Glenn and Patricia Weible against defendant in their Third Cause of Action of \$1,305.70 with interest thereon as provided by law.

(4) Judgment for recovery by plaintiffs of their costs herein.

(5) Such further relief as the Court shall deem just and proper.

THOMPSON & ROYSTON,

By /s/ CONRAD J. MOSS,

Attorneys for Plaintiffs. [9]

EXHIBIT "A"

Form 843

Treasury Department
Internal Revenue Service

Claim

To Be Filed With the Collector Where Assessment
Was Made or Tax Paid

The Collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse.

Collector's Stamp: [Blank]

- ☒ Refund of Taxes Illegally, Erroneously, or Excessively Collected.
- ☐ Refund of Amount Paid for Stamps Unused, or Used in Error or Excess.
- ☐ Abatement of Tax Assessed (not applicable to estate, gift, or income taxes).

State of California,
County of Los Angeles—ss.

Name of taxpayer or purchaser of stamps: Glenn Weible.

Business address: 1666 North Highland Avenue,
Los Angeles, California.

Residence

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return was filed: 6th District, California.
2. Period from: Jan. 1, 1947, to Dec. 31, 1947.
3. Character of assessment or tax: Income Tax.
4. Amount of assessment, \$1,320.13. Dates of payment: Withheld from wages by employer.

* * *

6. Amount to be refunded: \$696.13.

* * *

8. The time within which this claim may be legally filed expires, under Section 322 of I.R.C. on March 15, 1951.

The deponent verily believes that this claim should be allowed for the following reasons:

Taxpayer, a U. S. Citizen, employed by Max Factor & Co., was sent to Australia in June, 1946, and worked in the Australian Branch of Max Factor & Co. during the entire year of 1947. Taxpayer returned to the United States in October 15, 1948, for instructions and training and then was sent to Canada on October 29, 1948, for work at the Canadian Branch of Max Factor & Co. During 1947, taxpayer established his residence in Sydney, Australia.

Taxpayer claims exemption under Sec. 116 of I.R.C. Also see decision of U.S. Court of Appeals, Second Circuit, in Robert W. Seeley vs. Commissioner.

/s/

Subscribed and sworn to before me this
 day of, 19....

.....

(Signature of Officer
 Administering Oath.) [10]

EXHIBIT "B"

Form 843

Treasury Department
Internal Revenue Service

Claim

To Be Filed With the Collector Where Assessment
Was Made or Tax Paid

The Collector will indicate in the block below the
kind of claim filed, and fill in the certificate on the
reverse.

Collector's Stamp: [Blank]

- ☒ Refund of Taxes Illegally, Erroneously, or
Excessively Collected.
- ☐ Refund of Amount Paid for Stamps Un-
used, or Used in Error or Excess.
- ☐ Abatement of Tax Assessed (not applicable
to estate, gift, or income taxes).

State of California,
County of Los Angeles—ss.

Name of taxpayer or purchaser of stamps: Glenn
Weible and Patricia Weible.

Business address: 1666 North Highland Avenue,
Los Angeles 28, California.

Residence

The deponent, being duly sworn according to law,
deposes and says that this statement is made on be-

half of the taxpayer named, and that the facts given below are true and complete:

1. District in which return was filed: 6th District, California.
2. Period from: Jan. 1, 1948, to Dec. 31, 1948.
3. Character of assessment or tax: Income Tax.
4. Amount of assessment, \$983.96. Dates of payment: Withheld from wages by employer.

* * *

6. Amount to be refunded: \$983.96.

* * *

8. The time within which this claim may be legally filed expires, under Section 322 of I.R.C. on March 15, 1952.

The deponent verily believes that this claim should be allowed for the following reasons:

Taxpayer, a U. S. Citizen, employed by Max Factor & Co., was sent to Australia in 1946 and worked in the Australian Branch of Max Factor & Co. during 1946, 1947 and until October 15, 1948. Taxpayer returned to the U.S.A. on 10/15/48 for instructions and training and was then sent to Canada on 10/29/48 for work at the Canadian Branch of Max Factor & Co. During 1948 taxpayer did not reside in the U.S.A. In July, 1949, taxpayer was sent from the Canadian Branch direct to Great Britain and remained there until 12/17/50. He returned to the U.S.A. in December, 1950, for instructions and assignment to work at the Argentine Branch of his employer.

Taxpayer claims exemption under Sec. 116 of I.R.C. Also see decision in Robert W. Seeley vs. Commissioner, U. S. Circuit Court of Appeals, Second Circuit.

/s/
.....

Subscribed and sworn to before me this
day of, 19....

.....
(Signature of Officer
Administering Oath.) [11]

EXHIBIT "C"

Form 843
Treasury Department
Internal Revenue Service

Claim
To Be Filed With the Collector Where Assessment
Was Made or Tax Paid

The Collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse.

Collector's Stamp: [Blank]

☒ Refund of Taxes Illegally, Erroneously, or
Excessively Collected.

- ☐ Refund of Amount Paid for Stamps Unused, or Used in Error or Excess.
- ☐ Abatement of Tax Assessed (not applicable to estate, gift, or income taxes).

State of California,
County of Los Angeles—ss.

Name of taxpayer or purchaser of stamps: Glenn Weible and Patricia Weible.

Business address: 1666 North Highland Avenue,
Los Angeles, California.

Residence

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return was filed: 6th District, California.

2. Period from: Jan. 1, 1949, to Dec. 31, 1949.

3. Character of assessment or tax: Income Tax.

4. Amount of assessment, \$1,305.70. Dates of payment: Withheld from wages by employer, \$1,060.90; 2/15/50, \$244.80.

* * *

6. Amount to be refunded: \$1,305.70.

* * *

8. The time within which this claim may be legally filed expires, under Section 322 of I.R.C. on March 15, 1953.

The deponent verily believes that this claim should be allowed for the following reasons:

Taxpayer, a U. S. Citizen, employed by Max Factor & Co. was sent to the British Branch of his employer and worked in Great Britain during the entire year of 1949. Taxpayer established his residence in Bournemouth, England, and returned to the U.S.A. on 12/17/50 for instructions and assignment to Argentine Branch of his employer.

Taxpayer claims exemption under Sec. 116 of I.R.C. Also see decision in Robert W. Seeley vs. Commissioner, U. S. Circuit Court of Appeals, Second Circuit.

/s/
.....

Subscribed and sworn to before me this
day of, 19....

.....,
(Signature of Officer
Administering Oath.)

[Endorsed]: Filed July 14, 1953. [12]

[Title of District Court and Cause.]

ANSWER

Comes Now the defendant in answer to plaintiffs' complaint and admits, denies and alleges:

First Alleged Cause of Action

I.

Defendant admits that this action purports to be brought under Sections 1340 and 1346 of Title 28, United States Code, and Sections 322 and 3772 of the Internal Revenue Code and does not exceed \$10,000.00.

II.

Admits the allegations contained in paragraph 2 thereof and alleges that the payment was made by the sum of \$127.00 accompanying the return, and \$1,193.13 as his community share of the withholdings by his employer and his wife's employer from their community earnings during the year 1947.

III.

Defendant admits the allegations contained in paragraph 3, except that it denies any allegations contained in said claim not herein specifically [13] admitted.

IV.

Defendant admits the allegations contained in paragraph 4.

V.

(a) Defendant admits the allegations contained in paragraph 5 (a).

(b) Defendant is without knowledge or information sufficient to form a belief as to the truth of the averments in paragraph 5 (b).

(c) Defendant is without knowledge or information sufficient to form a belief as to the truth of the averments in paragraph 5 (c), except that it denies that plaintiff was a bona fide resident of Australia during the year 1947.

(d) Defendant is without knowledge or information sufficient to form a belief as to the truth of the averments in paragraph 5 (d).

VI.

Defendant denies the allegations contained in paragraph 6.

VII.

Defendant denies the allegations contained in paragraph 7, except that it admits that no refund has been made on account of said claim.

Second Alleged Cause of Action

I.

For answer to the allegations contained in paragraph 1, defendant incorporates herein its answer to paragraph 1 of the first alleged cause of action.

II.

Denies the allegations contained in paragraph 2 except it admits that on or about March 15, 1949, plaintiffs filed with the Collector of Internal Revenue for the Sixth District of California a Federal

income tax return for the year ended December 31, 1948, showing a tax owing of \$983.96, which amount was paid to said Collector by withholdings from the earnings of Glenn B. Weible by his employer, Max Factor and Company. [14]

III.

Defendant admits the allegations contained in paragraph 3, except that it denies any allegations contained in said claim not herein specifically admitted.

IV.

Defendant admits the allegations contained in paragraph 4.

V.

(a) Defendant is without knowledge or information sufficient to form a belief as to the truth of the averments in paragraph 5 (a), except that it admits that the plaintiff Glenn Weible was at all times mentioned a citizen of the United States.

(b) Defendant is without knowledge or information sufficient to form a belief as to the truth of the averments in paragraph 5 (b).

(c) For answer to the allegations contained in subparagraph (c) defendant incorporates herein its answer to the allegations contained in paragraph 5 (b) of the first alleged cause of action.

(d) Defendant is without knowledge or information sufficient to form a belief as to the truth of the averments in paragraph 5 (d), except that it denies that the plaintiff Glenn Weible was a bona

fide resident of Australia during the period June, 1946, to October 15, 1948.

(e) Defendant is without knowledge or information sufficient to form a belief as to the truth of the averments in paragraph 5 (e), except that it denies that the plaintiff Glenn Weible was a bona fide resident of either Australia or Canada during the year 1948.

(f) Defendant is without knowledge or information sufficient to form a belief as to the truth of the averments in paragraph 5 (f).

VI.

Defendant denies the allegations contained in paragraph 6.

VII.

Defendant denies the allegations contained in paragraph 7, except defendant admits that no refund has been made on account of said claim. [15]

Third Alleged Cause of Action

I.

For answer to the allegations contained in paragraph 1, defendant incorporates herein its answer to paragraph 1 of the first alleged cause of action.

II.

Denies the allegations contained in paragraph 2 thereof except it admits that on or about March 15, 1950, plaintiffs filed with the Collector of Internal Revenue for the Sixth District of California a Fed-

eral income tax return for the year ended December 31, 1949, showing a tax due of \$1,305.70, and concurrently paid therewith, said sum, by paying \$244.80 in cash and by attaching thereto a withholding statement showing Federal income tax withheld from the earnings of Glenn B. Weible by his employer, Max Factor and Company, of \$1,060.90.

III.

Defendant admits the allegations contained in paragraph 3, except that it denies any allegations contained in said claim not herein specifically admitted.

IV.

Defendant admits the allegations contained in paragraph 4.

V.

(a) Defendant is without knowledge or information sufficient to form a belief as to the truth of the averments in paragraph 5 (a), except that it admits that the plaintiff Glenn Weible was at all times mentioned a citizen of the United States.

(b) Defendant is without knowledge or information sufficient to form a belief as to the truth of the averments in paragraph 5 (b).

(c) For answer to the allegations contained in subparagraph (c), defendant incorporates herein its answer to paragraph 5 (b) of the first alleged cause of action and paragraphs 5 (d) and 5 (e) of the second alleged cause of action.

(d) Defendant is without knowledge or information sufficient to form a belief as to the truth of the averments in paragraph 5 (d), except that [16] it denies that plaintiffs were bona fide residents of either Canada or Great Britain during the year 1949.

(e) Defendant is without knowledge or information sufficient to form a belief as to the truth of the averments in paragraph 5 (e).

VI.

Defendant denies the allegations contained in paragraph 6.

VII.

Defendant denies the allegations contained in paragraph 7, except that it admits that no refund has been made on account of said claim.

Wherefore, having fully answered, defendant prays that the complaint be dismissed at plaintiffs' costs.

LAUGHLIN E. WATERS,
United States Attorney;

EDWARD R. McHALE,
Assistant U. S. Attorney,
Chief, Tax Division;

/s/ EDWARD R. McHALE,
Attorneys for Defendant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed January 11, 1954. [17]

[Title of District Court and Cause.]

PLAINTIFFS' SUPPLEMENTAL
MEMORANDUM

1. Defendant's Exhibit A for Identification is not admissible in evidence for lack of proper authentication.

Statutory authority for admission of foreign documents into evidence as an exception to the hearsay rule provides as follows:

28 U.S.C., Sec. 1741: "A copy of any foreign document of record or on file in a public office of a foreign country or political subdivision thereof, certified by the lawful custodian thereof, shall be admissible in evidence when authenticated by a certificate of a consular officer of the United States resident in such foreign country, under the [17-A] seal of his office, that the copy has been certified by the lawful custodian." (Emphasis added.)

Federal Rule of Civil Procedure 44 (a): "Authentication of Copy. An official record or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof or by a copy attested by the officer having the legal custody of the record, or by his deputy, and accompanied with a certificate that such officer has the custody. * * * If the office in which the record is kept is in a foreign state or country, the certificate may be made by a secretary of embassy or legation,

consul general, consul, vice counsel, or consular agent or by any officer in the foreign service of the United States stationed in the foreign state or country in which the record is kept, and authenticated by the seal of his office.” (Emphasis added.)

Defendant’s Exhibit A for Identification consists of two parts: (1) A letter dated June 24, 1954, addressed to Eldon P. King, Esq., by P. S. McGovern, Commissioner of Taxation, and (2) a document entitled “Statement for Commissioner of Internal Revenue, Washington, D. C., United States of America.”

Part 1, the letter dated June 24, 1954, is merely a letter of transmittal. It in no way complies with the statutory authority set out above nor does it authenticate its enclosures pursuant to the Statute or Rule. Furthermore, that transmittal letter has no relevance to the issues of this trial.

Part 2 is inadmissible because not authenticated in the manner required by the law as set forth above. Both 28 U.S.C., [17-B] Sec. 1741, and Fed. Rule 44 (a) require that a foreign document to be admissible in evidence, must be certified or attested by the lawful custodian of the document and be certified by an appropriate United States official that such person is the lawful custodian. Nowhere does it appear on this document that the person preparing it, P. S. McGovern, had the legal custody of the documents set forth in items 4 and 5 of the Statement. On the contrary, it appears on the face

of the documents that P. S. McGovern was not the custodian, but rather that the documents which P. S. McGovern purports to copy were filed with an entirely different agency than the agency in which he held office, i.e., the Secondary Industries Commission.

The authentication is further insufficient in that the certification of the consular officer does not certify that P. S. McGovern was the lawful custodian of documents which he purported to copy.

The entire statement of P. S. McGovern is hearsay, and since it does not fall within any exception to the hearsay rule, it is inadmissible in evidence.

2. Even if admissible in evidence, Defendant's Exhibit A for Identification does not contradict the conclusion that Plaintiff Glenn Weible was a bona fide resident of Australia in 1947 and 1948.

Glenn Weible and Michael Harris both testified that the length of Weible's assignment in Australia was indefinite since it depended on how long it would take Weible to set up a new manufacturing plant in Australia, and that it was not possible to predict a definite period for that project. They further testified that Weible agreed and intended to stay in Australia until the assignment was completed. Nothing in the purported application of Weible to the Secondary Industries Commission indicates a contrary intent. The completion in the application of the item [17-C] "Date of Departure Anticipated" as November, 1947, was no dechra-

tion of intent to depart at that time, but only a best guess as to when the job would be done. The explanation under the item, "Reasons for visit to Australia extending beyond twelve months" indicates Weible's view at that time as to the unpredictability of the length of his assignment in Australia and that any anticipation of his departure date must necessarily be uncertain.

3. The facts that plaintiff Glenn Weible retained an active membership in the Hollywood Athletic Club and a bank account in the United States are not inconsistent with his claim of bona fide residence abroad.

Almost all of the facts adduced at the trial are summarized and considered in Plaintiffs' Pre-trial Memorandum. In addition to these facts, Glenn Weible testified that he had retained an inactive membership in the Hollywood Athletic Club, of which he was an active member before he left this country. He further testified that this club affiliation enabled him to make certain club connections abroad, and that the dues for inactive membership were nominal. The retention of this membership is consistent with Weible's contention that he was a bona fide foreign resident. He dropped his active membership, indicating an intention to stay away for an extended and indefinite period. However, since inactive club membership afforded him an entree into some foreign clubs he retained an inactive membership at nominal cost.

Weible also testified that he retained his domestic bank account. Such conduct in no way conflicts with an intention to reside abroad. *Meals v. U. S.*, 110 Fed. Supp. 658; *Hamer*, 22 T. 343; *Pierce*, 22 T.C. 493.

Respectfully submitted,

THOMPSON, ROYSTON,
WIENER & MOSS,

By /s/ CONRAD J. MOSS,
Attorneys for Plaintiff.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed February 2, 1956. [17-D]

United States District Court for the Southern
District of California, Central Division

No. 15,717-T—Civil

GLENN WEIBLE and PATRICIA WEIBLE,
Plaintiffs,

vs.

UNITED STATES OF AMERICA,
Defendant.

FINDINGS OF FACT AND CONCLUSIONS
OF LAW AND JUDGMENT

The above case came on regularly for trial on January 9, 1956, before the Honorable Ernest A.

Tolin, United States District Judge, sitting without a jury, the plaintiffs appearing through their counsel, Clifford E. Royston and Conrad J. Moss, by Conrad J. Moss, Esq., and the defendant appearing through its counsel, Laughlin E. Waters, United States Attorney for the Southern District of California; Edward R. McHale, Assistant United States Attorney for said district, Chief, Tax Division, and Bruce I. Hochman, Assistant United States Attorney for said district, by Edward R. McHale, Esq., and evidence both oral and documentary having been received, the Court having duly considered the same and on March 23, 1956, having directed the entry of judgment in favor of the defendant, the Court now finds as follows: [19]

Findings of Fact

I.

The plaintiffs, Glenn and Patricia Weible, are residents of the Southern District of California, who are suing in his or her own right.

II.

The amount in controversy is less than \$10,000.00.

III.

Plaintiff, Glenn Weible, filed on March 15, 1948, his income tax return for the calendar year 1947 and paid the sum of \$1,320.13 federal income taxes for that year. On January 31, 1951, plaintiff Glenn Weible filed with the Collector of Internal Revenue for the Sixth District of California a claim for

refund of income taxes for the calendar year 1947, claiming an overpayment in the amount of \$696.13. Said claim was rejected by the defendant on March 27, 1952, and this action was filed on July 14, 1953.

IV.

On March 15, 1949, the plaintiffs filed with the Collector of Internal Revenue for the Sixth District of California a joint income tax return for the calendar year 1948 showing a tax owing of \$983.96, which amount was paid to said collector by withholdings from the earnings of Glenn B. Weible by his employer, Max Factor & Company.

V.

Plaintiffs filed a claim for refund with the Collector of Internal Revenue for the Sixth District of California on January 31, 1951, claiming an overpayment in the amount of \$983.96. Defendant rejected the claim on March 27, 1952; this action was filed timely on July 14, 1953.

VI.

On March 15, 1950, plaintiffs filed with the Collector of [20] Internal Revenue for the Sixth District of California a joint income tax return for the calendar year 1949 showing a tax due of \$1,305.70, and concurrently paid therewith, said sum, by paying \$244.80 in cash and by attaching thereto a withholding statement showing federal income tax withheld from the earnings of Glenn B. Weible by his employer, Max Factor & Company, in the sum of \$1,060.90.

VII.

Plaintiffs filed a claim for refund with the Collector of Internal Revenue for the Sixth District of California on January 31, 1951, claiming the amount of \$1,305.70 had been overpaid for the calendar year 1949. The defendant rejected the claim for refund on March 27, 1952; this action was commenced July 14, 1953.

VIII.

In Glenn Weible's claim for refund for the calendar year 1947 and in Glenn Weible's and Patricia Weible's joint claims for refund for the calendar years 1948 and 1949, the taxpayers claimed that they had overpaid their federal income taxes by reason that the taxes paid were computed upon income which was allegedly exempt from taxation under § 116 of the Internal Revenue Code of 1939.

IX.

In September, 1945, Glenn Weible entered into employment with Max Factor & Company, a domestic corporation engaged in the manufacture of cosmetic products, as its representative to train personnel in its foreign branches, to organize and supervise the establishment in foreign countries of cosmetic manufacturing plants for said employer. Glenn Weible was a chemical engineer who had worked for Max Factor & Company prior to the war. Before commencing his overseas assignment he underwent in 1945 and 1946 a short refresher course in the [21] California plant of the company.

In 1945 Glenn Weible was married to Jean Burt Weible, who was head of the hairdressing department of Warner Bros. Pictures in Burbank, California. They had no children.

X.

Early in 1946 Glenn Weible and his then wife, Jean Burt Weible, spent two or three months in Mexico. Glenn Weible and Jean Burt Weible maintained an apartment in North Hollywood, California, and owned household goods and an automobile. They also jointly owned an unimproved residential lot located in Los Angeles. Glenn Weible also maintained a membership in a private club, the Hollywood Athletic Club, during the years involved.

Prior to Glenn Weible's departure for Australia in June of 1946, Glenn Weible and his then wife, Jean Burt Weible, decided she would not accompany him to Australia, but maintain the apartment in North Hollywood and join him later.

XI.

Glenn Weible was employed by Michael Harris, a Vice-President of Max Factor & Company in charge of the export division. There was no written contract or written memorandum of contract entered into between Glenn Weible and his employer. The nature of the employment upon which Glenn Weible was to embark was to be in connection with the expansion overseas of the manufacturing operations of Max Factor & Company. In 1945 and 1946, the company had plans to establish manufacturing plants in Australia and the Far East, that is,

Shanghai, Tokio, the Philippines and China. Glenn Weible was to be sent to a particular foreign place to set up a factory to train citizens of the particular foreign country in the Max Factor manufacturing processes and when the operation was running smoothly with said citizens in charge, to leave. [22] No particular length of time was fixed for his sojourn in any of the countries to which he was to be sent.

XII.

Glenn Weible traveled to Sydney, Australia, in June of 1946, and as part of the Max Factor team of key employees to assist in setting up a manufacturing branch there. During 1946 his wife, Jean Burt Weible, wrote him from Los Angeles and informed him she desired a divorce. Prior to leaving the United States Glenn Weible sold his automobile and left his household goods with his wife. Jean Burt Weible obtained a divorce from Glenn Weible in 1947. In connection with the divorce, Glenn Weible purchased from his wife for \$7,500.00 her joint interest in the unimproved residential lot located in Los Angeles, California. During all the years involved in the litigation, the plaintiff, Glenn Weible, continued to make substantial payments on the trust deed encumbering the vacant residential property located in Los Angeles.

XIII.

All the income involved in the claims for refund in this action are attributable to the earnings of Glenn Weible for personal services rendered Max

Factor & Company and paid to Glenn Weible by deposit to his bank account in Los Angeles by Max Factor & Company. The income tax returns of Glenn Weible were prepared for him by accountants of Max Factor & Company in Los Angeles, California.

XIV.

While in Sydney, Glenn Weible rented a furnished apartment on a one-year lease, and bought such necessary items as bedding and mattresses, kitchen utensils and china. He employed a housekeeper. [23]

XV.

Glenn Weible secured exemption from the Australian income tax laws by filing with the Australian Government a statement that he was a non-resident of Australia; that his usual place of residence was the United States of America and that he anticipated leaving Australia in November, 1947. Because the Australian operation took longer than anticipated, Glenn Weible actually stayed in Australia until October, 1948. From the period following June 15, 1948, he was not regarded as exempt from Australian taxes by the Australian Government. However, his income for the period June 15 to June 30, 1948, was not large enough to subject him to the tax and only the income from July 1, 1948, to October 9, 1948, was subjected to the tax.

XVI.

During his stay in Australia Glenn Weible met and became engaged to Patricia. At the conclusion

of the Australian venture and after the manufacturing plant was manned by the Australian personnel, Glenn Weible returned to the United States in October, 1948, for a two weeks' stay. His divorce having become final, he married in the United States his present wife, Patricia Weible.

XVII.

Glenn Weible was then sent to Toronto, Canada, by Max Factor & Company, to set up a manufacturing establishment for a new product and container which had never been manufactured in Canada. He and Patricia Weible rented a furnished apartment in Toronto, Canada. They remained there until June of 1949, when the company ordered him to England in July, 1949, to assist in the training and supervision of factory personnel in the methods and procedures of the manufacture of its products. The Weibles remained continuously at the British branch until [24] December, 1950, when he was called back to the United States, for two months' training before being sent on an assignment to South America.

XVIII.

Glenn Weible entered into employment with Max Factor & Company with the intention of setting up manufacturing branches wherever the company would send him, whether Australia, the Far East, or elsewhere. He never, during the years involved, had the intention of becoming a permanent resi-

dent of either Australia, Canada, England or any other particular foreign country.

XIX.

During the year 1947, Glenn Weible, and during the years 1948 and 1949, Glenn and Patricia Weible, were residents of the United States of America.

XX.

During the years in question the plaintiffs or either of them did not establish permanent homes in any of the countries in which they sojourned. They did not buy or establish a permanent residence or home in any of the countries. Glenn Weible's intent throughout the period was to remain an employee of Max Factor & Company and he never had an intent to remain in any of the countries in which he sojourned other than as an employee of Max Factor & Company. He never intended to leave Max Factor & Company's employment and seek permanent employment in any of the countries in which he sojourned.

XXI.

By its very nature, his tour of duty in a foreign country for Max Factor & Company was temporary, company policy being to staff its foreign branches with citizens of the particular foreign country. [25]

XXII.

Any conclusion of law herein which is deemed to be a fact is hereby found as a fact and incorporated herein as a finding of fact.

Conclusions of Law

From these facts the Court concludes as follows:

I.

This Court has jurisdiction of this controversy and of the parties hereto.

II.

Plaintiff Glenn Weible was not a bona fide resident of Australia for the calendar year 1947 within the meaning of Section 116 of the Internal Revenue Code of 1939, and therefore, his earnings from his employment from Max Factor & Company during said year are taxable.

III.

The plaintiffs Glenn Weible and Patricia Weible were not bona fide residents of Australia or Canada during the calendar year of 1948, but were residents of the United States, and therefore the earnings of Glenn Weible from Max Factor & Company during said year were taxable.

IV.

Glenn Weible and Patricia Weible were not bona fide residents of Canada and England in 1949, but were residents of the United States, and therefore the earnings of Glenn Weible from Max Factor & Company for said year were taxable.

V.

Any finding of fact herein which is deemed to be a conclusion of law is hereby concluded as a

matter of law and incorporated herein as a conclusion of law. [26]

VI.

Defendant is entitled to judgment that the plaintiffs take nothing by reason of this action, that the complaint be dismissed with prejudice, and that it have judgment for its costs.

Judgment

In accordance with the foregoing findings of fact and conclusions of law, it is ordered, adjudged and decreed:

That the plaintiffs take nothing by their complaint; that the complaint may be and is dismissed with prejudice and that the defendant have judgment for and shall recover from plaintiffs the amount of its costs to be taxed by the Clerk of this Court in the sum of \$20.00.

Dated this 5th day of April, 1956.

/s/ ERNEST A. TOLIN,

United States District Judge.

Affidavit of Service by Mail attached.

Lodged March 30, 1956.

[Endorsed]: Filed April 5, 1956.

Docketed and entered April 6, 1956. [27]

[Title of District Court and Cause.]

REQUEST FOR ADDITIONAL AND FOR
AMENDMENTS TO FINDINGS OF FACT
PROPOSED BY DEFENDANT

Plaintiffs request the following additions and amendments to the findings of fact proposed by defendant (references are to paragraph numbers of defendant's proposed findings of fact):

X.

Delete the following words on page 4, line 12:

“during the years involved,”

and substitute therefore the following phrase:

“which he changed to an inactive membership during the years involved.”

XI.

Delete the period at the end of the last sentence on page 4 and insert the following:

“, and to undertake another foreign assignment for his employer. Weible and his employer agreed that he would remain continuously outside of the [28-A] United States in the performance of his duties except for short periods of training and consultation.”

XII.

Insert the following after the first sentence ending on page 5, line 6:

“No definite time was set by either Weible or his employer for the completion of that

project because they were unable to predict how long it would take. Weible agreed to remain in Australia until the assignment was completed.”

XIV.

Add the following at the end of the paragraph:

“He frequented a local club and actively entered into the social life of Sydney. His friends and associates were predominantly Australians.”

XV.

Delete this paragraph in its entirety and substitute the following in its place:

“Weible secured exemption from the Australian income tax laws for the first two years of his stay there, and after the expiration of the exemption period paid tax on his income from July 1, 1948, to October 9, 1948.”

XVII.

Add the following sentence at the end of the first sentence at page 6, line 27:

“No definite time was fixed by Weible or his employer for the length of his stay in Canada, but he agreed to stay as long as necessary to accomplish his assignment.” [28-B]

XVIII.

Delete the last period and the following at the end of the paragraph:

“, but intended to remain abroad for an indefinite period in the foreign service of Max Factor.”

XX.

Delete this paragraph.

XXI.

Delete the word “a” in the first line thereof at page 7, line 29, and substitute therefore the words “anyone.”

Reasons and Authority

1. Whether a person is a bona fide foreign resident within the meaning of the Internal Revenue Code depends upon all of the aspects of his life in a foreign country (Plaintiffs’ Pre-trial Memorandum, pp. 4-6). The deletions and amendments requested in paragraphs X, XI and XIV amplify the findings of fact to include important aspects of plaintiffs’ life abroad.

2. An intent to remain abroad for an indefinite period is an important factor in determining bona fide residence abroad. The indefinite character of Weible’s employment abroad is covered by the amendments requested to paragraphs XI, XII, XVII and XVIII.

3. The amendment to paragraph XV is requested for the reason that the statement referred to in defendant’s proposed finding was inadmissible in evidence for the reasons stated in Plaintiffs’ Supplemental Memorandum.

4. Paragraph XX is immaterial to the issues of this case for the reasons stated in Plaintiffs' Pre-trial Memorandum, page 8, lines 4-12.

Respectfully submitted,

THOMPSON, ROYSTON,
WIENER & MOSS,

By /s/ CONRAD J. MOSS.

Receipt of copy acknowledged.

[Endorsed]: Filed April 5, 1956. [28-C]

[Title of District Court and Cause.]

NOTICE OF APPEAL TO
COURT OF APPEALS

Notice Is Hereby Given that Glenn Weible and Patricia Weible, plaintiffs above named, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on April 6, 1956.

Dated May 8th, 1956.

/s/ CONRAD J. MOSS, for
THOMPSON, ROYSTON,
WIENER & MOSS,
Attorneys for Appellants.

Affidavit of Service by Mail attached.

[Endorsed]: Filed May 9, 1956. [29]

In the United States District Court, Southern
District of California, Central Division

No. 15717-T

Honorable Ernest A. Tolin, Judge Presiding.

GLENN WEIBLE and PATRICIA WEIBLE,

Plaintiffs,

vs.

UNITED STATES,

Defendant.

REPORTER'S TRANSCRIPT OF
PROCEEDINGS

Los Angeles, California

January 9, 1956

Appearances:

For the Plaintiffs:

CONRAD J. MOSS,

433 South Spring Street, Suite 705,

Los Angeles, California.

For the Defendant:

LAUGHLIN E. WATERS,

United States Attorney, by

EDWARD R. McHALE,

Assistant United States Attorney,

600 Federal Building,

Los Angeles, California.

Monday, January 9, 1956—2:00 P.M.

The Court: Call our calendar, please.

The Clerk: 15,717, Glen Weible, et al., v. United States, for trial.

The Court: Are you ready for trial?

Mr. Moss: Ready for the plaintiffs, your Honor.

Mr. McHale: Ready for the defendant.

The Court: How long do you expect the presentation will require?

Mr. Moss: Approximately two hours to put on the plaintiffs' case, I believe, your Honor.

Mr. McHale: Our case will consist of cross-examination primarily.

The Court: All right. Proceed.

Mr. Moss: Your Honor, I was just discussing one factual issue with the counsel for the defendant, with respect to one of the claims for refund alleged in the Complaint, the filing of which is admitted. One of the facts respecting it, I would like to take a moment to verify that point.

The Court: Surely.

Mr. Moss: Your Honor, this is an action for refund of taxes, income taxes, paid to the United States for the taxable years 1947, 1948 and 1949.

The plaintiff has filed a pretrial memorandum setting [2*] forth summary statement of the facts, and memorandum about the law. There is, as the memorandum states, one issue before the Court, and that is, whether or not the plaintiff Glenn Weible in the year 1947, and the plaintiffs Glenn and Pa-

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

tricia Weible in the years 1948 and '49, were bona fide residents of a foreign country or countries, within the meaning of the 1939 Internal Revenue Code, Section 116(a).

To clarify that point, plaintiff Glenn Weible in 1947 filed a return with his then wife—I beg your pardon. He filed a separate return reporting half of the community income of himself and then wife, who was divorced in September, 1947, and married in the latter part of 1948 to his second wife. And his returns for 1948 and '49 were joint returns.

The filing of the returns and the payment of the tax has been admitted, as has the filing of the claims for refund, as alleged in the Complaint, leaving us just one factual issue as to bona fide residence.

The plaintiff will call two witnesses, Mr. Michael Harris, vice president of the Max Factor Company, the employer of Glenn Weible, and Glenn Weible himself.

At this time the plaintiff would like to call Mr. Michael Harris to the stand.

Will you take the stand, Mr. Harris? [3]

MICHAEL HARRIS

called as a witness on behalf of the plaintiffs, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you please be seated.

Your full name, please?

The Witness: Michael Harris.

Direct Examination

By Mr. Moss:

Q. What is your position, Mr. Harris?

A. Vice president, export division of Max Factor & Co.

Q. In what capacity? What are your duties with that company?

A. Complete supervision of our export division and our overseas activities.

Q. Were you in this position in the years 1946 and after? A. Yes; since 1933.

Q. In that position, have you been concerned with the work assignments of Glenn Weible, the plaintiff in this case?

A. Yes, he comes directly under my supervision.

Q. Are you familiar with the facts concerning the employment of Mr. Weible by the company?

A. Yes, I am.

Q. Can you tell me when he was first employed at Max Factor? [4]

A. In the late 1930's; before the war.

Q. Do you recall what his duties were at that time?

(Testimony of Michael Harris.)

A. Primarily chemist, working in our laboratories.

Q. What did he have to do as a chemist?

A. He was in charge in developing new products, checking formulas, testing materials.

Q. Has he worked for Max Factor since that time?

A. Yes. He left Max Factor during the war years and returned in 1945 or early '46. He has been with us since that time continuously.

Q. 1945, at the time that you stated Mr. Weible was re-employed, what was the nature of the export activities of Max Factor?

A. We were just arranging to re-embark on a very wide expansion program overseas, a program which we had already begun working with when the war stopped us.

We had in mind opening branches in about a half a dozen countries throughout the world immediately the hostilities ceased. Mr. Weible had been working with Lockheed and when the war activities at Lockheed dropped off, he reopened his discussions with us about resuming his activities with us.

Because of the widened scope of his activities at Lockheed, we felt that Glenn could be very useful as an addition to our overseas staff in actually setting up complete factory operations. [5]

Q. You employed him then in what capacity in 1945, when you re-employed him?

A. He was to come in for a period of preliminary training, to sort of have a refresher course

(Testimony of Michael Harris.)

and immediately go overseas, with the first installation to be in Australia and from then on, wherever required.

Q. What was the nature of your employment agreement with Mr. Weible with respect to his duties overseas?

A. We had no formal agreement, if that is what you mean. We had no written contract or memorandum. We operated on a very informal basis.

Mr. Weible first discussed the proposal with Mr. Max Factor, Jr., the head of our laboratories, and then I was brought into the picture and he was put under my supervision.

Q. Was he employed to work exclusively in the foreign department?

A. Yes, exclusively in the foreign department and exclusively overseas.

Q. Was there anything said in your employment arrangement with respect to how long Mr. Weible would be required to remain overseas?

A. For each assignment it was completely indefinite, because we had no idea how long it would take us to establish a plant. He would stay with an operation until we thought it was on its feet and ready to move to another location. [6]

Q. When he finished one assignment, what was your understanding with respect to subsequent assignments?

A. He would then proceed wherever instructed or, if necessary, come back for a training period in between assignments.

(Testimony of Michael Harris.)

Q. Subsequent assignments would be overseas or domestic? A. Overseas entirely.

Q. Has Mr. Weible been employed in your department since that time?

A. Yes, continuously.

Q. Do you recall what Mr. Weible's first assignment was for Max Factor after his re-employment in 1945?

A. Yes. He went to Australia. We opened a plant in Sydney. We picked up a shell of a building and started from scratch. Mr. Weible was in charge of arranging for the importation and installation of necessary equipment and machinery, the arrangements for local production of containers, packages, supplies, the installation of a complete factory operation, the training of local chemists, sales department, et cetera.

Q. Do you recall whether he went to Mexico before he went to Australia?

A. He was in Mexico for a two- or three-month period. I am not sure whether it was just before he went to Australia or between the time he came back from Australia and went to [7] Canada. There was a two- or three-month interval there somewhere.

Q. At that time Mr. Weible went to Australia, had the company any plans relating to other offices in the Far East?

A. Yes, we already owned property in Shanghai and it was our intention to establish a factory and a branch operation for China, and also in Tokyo. We had an arrangement in the Philippines,

(Testimony of Michael Harris.)

which later also became a factory branch. So there were four operations we had in mind at the time in the Far East.

Q. At the time Mr. Weible was sent to Australia, was any definite time fixed for the time he would remain there on that job?

A. No, sir, except that he was to stay there until we had trained an Australia crew, equipped to take over.

Q. Could you in the company fix any time within which that operation would be established?

A. No, we could not. We had operations of that type that took from three months to five years to get under way.

Q. Was anything said to Mr. Weible at the time he left for Australia regarding what his following assignment would be or how did you leave that?

A. No, there was no arrangement for that at all.

Q. And then do you recall how long he stayed in Australia? [8] A. About two years.

Q. Do you recall specifically within the year—that would make it 1948—when he was recalled?

A. I think he came back shortly after midyear of '48.

Q. And what were the circumstances relating to his recall from Australia?

A. The job in Australia was operating pretty well on its own. We had Mr. Weible come back to Hollywood then for a matter of two or three weeks, I believe—not over a month, anyway—and then sent him to Canada as his next assignment. My recollec-

(Testimony of Michael Harris.)

tion would be he came back from Australia in August or September and was in Canada within the next month.

Q. What was your understanding with Mr. Weible with regard to the length of time of his Canadian assignment?

A. There were no terms arranged. It was more or less the same as the Australian operation. We were starting from scratch in Canada on a manufacturing operation.

Q. And would you describe what his duties were in Canada, to the extent they may have been different than those you have already described for Australia?

A. Yes. In Canada we already had a sales organization for a number of years, but we did no manufacturing. We were at this time developing a number of new products and decided that was a good opportunity for starting the manufacturing in Canada. [9]

Q. Then, as I understand you, there had been prior to Mr. Weible's visit no manufacturing branch at all of any kind in Australia?

A. That is right.

Q. That was an import arrangement?

A. A straight import before the war, finished packages ready for sale.

Q. Do you recall how long Mr. Weible remained in Canada? A. About a year.

Q. Do you recall the circumstances surrounding his departure from Canada?

(Testimony of Michael Harris.)

A. Yes, very well. We ran into trouble in our British manufacturing plant and found it necessary to send a complete team over from the States. We called Mr. Weible in Toronto and asked him if he could get over to England immediately. He didn't come back to Hollywood. He went directly to England.

Q. What was to be his task in England?

A. To take over our manufacturing laboratories and operate them until we could replace the staff with whom we were having trouble.

Q. Was any fixed time, any definite period set for the completion of this task?

A. No, there was no time limit set. [10]

Q. Did Mr. Weible fix any definite time on the length of his stay in England on this assignment?

A. No, I don't believe there was even any discussion as to that.

Q. Do you recall how long Mr. Weible remained in Great Britain on this assignment?

A. It was over two years.

Q. Do you recall when he went to England, the date when he left for England, approximately?

A. I am trying to tie it into the time when I went over, too, because I was part of that team.

Q. Yes.

A. I think Mr. Weible went over in midsummer of 19—let's see, '46, '48; that would be '49.

Q. Then you say he stayed for approximately——

(Testimony of Michael Harris.)

A. He stayed something over two years in England and on the continent.

Q. How long, do you recall, was he in England most of the time or on the continent?

A. He was in England for a year and a half. And then after his duties in the plant eased up a little, he visited some of our branches on the European continent.

Q. When he was recalled from England, was his job, or was the job of setting up the manufacturing operation, the reorganization, completed? [11]

A. Yes, we had a new staff hired and trained, ready to take over.

Q. Then what was done with Mr. Weible?

A. Mr. Weible came back again for several weeks at home, and we then assigned him to South America. We had a program for opening branches then in Argentina, Brazil and Colombia.

Q. How long did he remain in South America on this assignment?

A. From that time until now. He just come back. I think he has been back twice within that four-year period.

Q. What was the nature of his return visits?

A. Once he was brought in because of illness of his mother. He was here a couple of weeks.

The other time would have been a regular holiday, homecoming.

Q. Do you know whether Mr. Weible has or has not maintained a residence in the United States during this period, subsequent to 1946?

(Testimony of Michael Harris.)

A. So far as I know, he has no residence here.

Q. Do you know who prepared and filed the income tax return for Mr. Weible during the years '47, '48 and '49?

A. Our accounting department. They handled the returns for all our traveling overseas personnel.

Q. Would those returns, as they are alleged in the Complaint, show that the tax was paid by—the tax on Mr. [12] Weible's income in those years was paid by withholding from the Factor Company, do you recall?

Do you recall the circumstances surrounding the withholding of income tax on Mr. Weible's return during those years?

A. Yes, there were some discussions among our accountants and heads of our legal department, and among us we decided, as long as there seemed to be some possible doubt as to the Government's interpretation of overseas residence we would withhold and play doubly safe. I think that went on for three or four years.

Mr. Moss: No further questions.

Cross-Examination

By Mr. McHale:

Q. Mr. Harris, there was no written contract of any kind with Mr. Weible? A. That is right.

Q. Was Mr. Weible the only person sent from Max Factor to Australia in 1946, or did you send other persons?

(Testimony of Michael Harris.)

A. No, Mr. Sidney Factor went to Australia several weeks before Mr. Weible and remained in Australia almost two years. Most of that time overlapped Mr. Weible's.

We then had a third member, a sales manager, whom we sent over, a Mr. Sidney Myer, who was there during the second year of Mr. Weible's stay and then remained after Mr. Weible had left. [13]

Q. Just what was Mr. Weible's assignment on this trip to Australia?

A. To set up a manufacturing plant, to install the machinery, get it, purchase it, train an operating crew, and arrange for the local production of whatever supplies we could obtain in Australia.

Q. Was he to hire local personnel to operate and manage the plant? A. Yes.

Q. And did the local Australians eventually take over the management and operation of the plant?

A. Yes, we now have a 100 per cent Australian operation.

Q. Have you followed that pattern in your other operations? A. Yes, that is our basic policy.

Q. In other words, Mr. Harris, what you do is send someone over from your company to set it up, but it is the idea of the company to be replaced by local personnel in the various countries? Is that the general method of operation?

A. That is quite correct.

Q. The same would be true for your Canadian operation, when you sent Mr. Weible to Canada?

A. Yes.

(Testimony of Michael Harris.)

Q. There were other people from Max Factor sent also?

A. Yes, we sent sales personnel and administrative heads, [14] also.

Q. He was to set up the manufacturing and train local personnel to take over the operation?

A. That is right.

Q. Do you know any of the details of the way his salary payments were handled when he was sent to Australia?

A. Our general pattern there—and I think it applied to Mr. Weible throughout that period—was to deposit his checks in his bank account here in the United States.

Q. Then Mr. Weible maintained a bank account here in Los Angeles, or in California?

A. Yes, I am sure he did.

Q. To your knowledge did Mr. Weible maintain any other property here in this country?

A. Mr. Weible owned a lot. I think it was—I am not sure whether it was before he went to Australia or when he came back from that trip. I believe he still owns that vacant piece of property.

Q. Any other property that you know of?

A. None that I know of.

Mr. McHale: That is all.

Mr. Moss: I have no further questions.

The Court: Thank you, sir.

The Witness: Thank you.

(Witness excused.) [15]

Mr. Moss: The plaintiff, Mr. Weible, will now take the stand.

GLENN WEIBLE

a plaintiff herein, called as a witness in his own behalf, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you please be seated?

Your full name, sir?

The Witness: Glenn Weible.

Direct Examination

By Mr. Moss:

Q. What is your profession, Mr. Weible?

A. Chemical engineer.

Q. What academic training, if any special training in this field, do you have?

A. I am a graduate chemical engineer and have had several years of training in work.

Q. When did you first go to work for Max Factor?

A. In 1938.

Q. What was the nature of your work there?

A. Chemist in the laboratory, doing various types of compounding.

Q. What is "compounding"?

A. In this particular case, trying to formulate new products of various types. [16]

Q. Do you recall the date when you left your employment with Max Factor?

A. July, 1941.

Q. What were the circumstances leading to your leaving at that time?

(Testimony of Glenn Weible.)

A. I was acquainted with various personnel at Lockheed Aircraft and was informed they were just starting a research department which included a chemical research division, and it looked like a very important type of a job. So I applied and was employed as their first chemist, for Lockheed.

Q. What was the nature of your work while at Lockheed?

A. For three years I was in charge of the chemical research division, and then moved up to process engineer.

Q. What were your duties as process engineer?

A. They are in charge of all the various processes that have to do with the fabrication of the airplane.

Q. Could you be just a little more specific on what the processes were?

A. I should say the chemical processes.

Q. During the war years, did you have any contact with the Factor Company?

A. Toward '44 and '45 there were quite a few contacts, as they were doing some subcontract work at that time for the various aircraft companies. And actually, Lockheed gave them some jobs to do which were of a chemical nature and which I [17] had contacts through Max Factor, between Max Factor and Lockheed on these particular jobs.

Q. How long did you stay at Lockheed?

A. Until, I believe, September, 1945.

Q. Where did you go when you finished your employment with Lockheed?

(Testimony of Glenn Weible.)

A. I went back with Max Factor & Co.

Q. Will you describe the circumstances surrounding your re-employment with Max Factor?

A. Perhaps a year or six months before the actual employment, I had discussed on various occasions, or, had discussions with Max Factor, Jr., who had told me of an expansion program they planned, and I had indicated my desire to come back and work in this expansion program; primarily, setting up branches in foreign countries.

Q. Was anything said at that time with respect to the nature of your work, as between foreign and domestic service with Factor?

A. It was definitely for foreign work.

Q. It was anticipated you were to work only on foreign work, or partly on each?

A. No, it was only on foreign work.

Q. With whom at Max Factor did you make your final employment arrangements?

A. With Mr. Harris. [18]

Q. What was the nature of your employment agreement, arrangement with Mr. Harris?

A. Previous to my discussions with Mr. Harris, as I stated before, I had had discussions with Max Factor, Jr., and he had indicated they were interested in my coming with them and when I talked with Mr. Harris there was the formality of the actual filling out of the employment forms and so forth. There were no contracts, but I was to come back into the plant and work for a period of two or

(Testimony of Glenn Weible.)

three months and then go out on the first assignment.

Q. Did you have any specific understanding with respect to the length of time of your foreign assignments? A. No.

Q. Did you have any understanding at the beginning of your agreement with respect to what you would do when one foreign assignment was completed? A. No.

Q. Was it your understanding that you might be assigned back to the United States after one foreign assignment, or was there no understanding at all on that point?

A. No, in our original, our preliminary discussions there were many countries named where we wanted to get started as quickly as possible.

In fact, when I came back with Max Factor in '45 I purchased equipment for several countries at the same time, [19] duplicate and triplicate sets of equipment, which we did subsequently use in various countries, so that the general idea was as soon as one was finished we would go on to the next one and start.

Q. Now, after you resumed employment with Factor in September of 1945, what did you do right after that?

A. I worked in the plant becoming reacquainted with all the operations there. And also purchased equipment for various countries where we had operations planned. This took place from September

(Testimony of Glenn Weible.)

until December. And then in January, '46, I went to Mexico.

Q. How long were you in Mexico?

A. Until May, the latter part of April or the 1st of May.

Q. What were your duties in Mexico?

A. We set up—we had a partial manufacturing plant there, but we set up additional plant operations starting new products which they had manufactured heretofore.

Q. Then in May, '46, your assignment in Mexico was completed, and then what did you do?

A. I came back to the United States and left for Australia in June, 1st of June.

Q. What was your agreement with the company with respect to the length of time you would be gone to Australia, if there was one? [20]

A. There was no agreement as to the length of time, because none of us knew how long it would take to get the operation going. There were many restrictions, import restrictions, problems of raw materials, containers, and various things.

Q. Did you fix any definite time as to the length of time you would remain, consent to remain in Australia? A. No.

Q. Would you describe what you did on this assignment in Australia?

A. Well, we bought an old building, which it was necessary to do completely over, starting out with the contractor, architect's plans. We reworked the whole building, and then purchased and imported

(Testimony of Glenn Weible.)

various containers or other machinery, raw materials, installation of all the equipment in the building, and supplying suppliers of raw materials, purchasing—to see that they met our specifications, and training various personnel.

Q. Did you know before you went to Australia who would be your sources of supply or who would be your personnel? A. No.

Q. You located them after you arrived?

A. That is right.

Q. Do you recall how long you had been in Australia before the plant was set up in sufficient condition to start [21] manufacturing?

A. Almost one year.

Q. At the time you left Australia, do you recall what the size of the operation, including the personnel, was?

A. Yes, men and women, possibly 90 to 95 people.

Q. Who had trained these people?

A. All those having to do with manufacturing and shipping and so forth, I had trained. The sales personnel had been trained by other people.

Q. In your opinion was it possible to predict before you went to Australia that a definite time would be taken to accomplish this, the establishment of this manufacturing operation?

A. We considered it would be a year and a half to a two-year job.

Q. In fact, how long did it take?

A. I was there two years and four months.

(Testimony of Glenn Weible.)

Q. At the time you left on the Australia assignment, did you intend to stay there until it was finished? A. Yes.

Q. Was there any discussion at the time you left for Australia regarding any other operations in the Far Eastern area?

A. Yes. I also had purchased equipment to be shipped to China for operations in Shanghai, and had also worked over [22] some floor plans and blueprints for the operation there prior to going, and we had discussed the possibility of my leaving Australia and going direct to Shanghai when I had completed my work in Australia.

Q. Did you, in fact, do that?

A. No, the political picture was trying to change during that period and we didn't go ahead with our plant in Shanghai.

Q. You left for Australia in 1946. What did you do with your household goods?

A. My wife remained here at that time and the household goods remained with her. I sold an automobile I had. Aside from—my personal belongings and some electrical appliances, radio and phonograph, and so forth, I took with me the rest, remainder.

Q. Your first wife, you say she remained in the apartment? A. In the United States, yes.

Q. Was she employed at that time?

A. Yes, she was.

Q. What was the nature of her employment?

(Testimony of Glenn Weible.)

A. She was in charge of the hairdressing department at Warner Bros. Studio.

Q. The whole department or the hairdressing only?

A. No, in charge of the department. [23]

Q. Did you have any arrangements with your wife with respect to her joining you in Australia?

A. She had been down to Mexico with me part of the time, and due to the position she held it was impossible for her to go to Australia at that time. But we did discuss the possibility of her joining me at the end of a year, if we saw the operation was going to take considerable longer.

Q. Did she, in fact, join you?

A. No, she didn't.

Q. What happened there?

A. Before the year was up she had written me stating that she would like to get a divorce.

Q. What was the disposition of the family furniture and furnishings and other property which you had left in the apartment at the time of the divorce?

A. They all went to my wife.

Q. Did you retain any personal property in the United States after that settlement?

A. There was a piece of building property which we had jointly, and after I came back from Australia I purchase the half of it from her.

Q. You kept your bank account, also?

A. And the bank account was here, which at the time of the divorce was divided.

(Testimony of Glenn Weible.)

Q. Since that time have you maintained a residence of [24] any kind in the United States?

A. No, sir.

Q. Have you had any household furnishings stored for you here? A. No.

Q. What living arrangements did you make in Sydney?

A. I had an apartment partially furnished. The remainder of the furniture I purchased there.

Q. Do you recall what items you did purchase for the apartment?

A. Yes. Complete bedding, as well as mattresses, kitchen appliances, utensils and china.

Q. Do you recall whether you entered into a lease or there was a lease on that apartment?

A. Yes.

Q. Do you recall how long that was?

A. A year at a time.

Q. Who paid for the rent and utilities?

A. There was an allowance——

Q. Will you explain how payment was made for those things?

A. Well, we had a living allowance from the company, and this was paid out of this allowance.

Q. Did you do your own cooking and housekeeping? A. Had a housekeeper. [25]

Q. That you employed? A. Yes.

Q. When you first went there, did you live alone?

A. I was living with Sidney Factor, who was with me at the time.

(Testimony of Glenn Weible.)

Q. Did you do any entertaining when you were there? A. Yes, considerable.

Q. In your home or outside, or both?

A. Both.

Q. Who were your guests there? That is, can you tell us what proportion of them were Australians and what proportion were——

A. I would say more than 95 per cent were Australians.

Q. Who were these Australians, people you met there, business people?

A. Yes, they were business people. We were associating with them in business, and suppliers. There were many people employed in the government personnel, friends.

Q. Can you tell us who were some of the government people or officials that you had social contact with?

A. I was acquainted with William McKell, who was at that time Premier of South Wales and later became Governor General.

I also knew our Ambassador in Australia, the American Ambassador, and many of the other state officials in [26] South Wales.

Q. Did you ever visit the home of the your Australian friends? A. Yes, many times.

Q. And how frequently would you suppose you had social engagements with your Australian friends? A. At least once or twice a week.

Q. Did you make any club affiliations while you were in Australia?

(Testimony of Glenn Weible.)

A. Yes. I belonged to two clubs. One was the Tattersall Club, which is a sports and social club. It was not really a membership, but I was entitled to use the facilities of the club due to the membership of the club I had here, the Hollywood Athletic Club.

The other club was the American Club, formed while I was there. In fact, I helped to some extent to form this club, which is a social club for American people living in foreign countries, as well as some Australians or some nationals of the country.

Q. What is the makeup of the Tattersall Club?

A. It would be Australian people belonging to it. It is a men's club, mostly from a sports and athletic standpoint.

Q. Can you give us any idea how often you visited at the Tattersall Club?

A. Twice or three times a week. [27]

Q. Did you make any close personal friends while you were in Australia?

A. Yes, a number of very close friends.

Q. You have corresponded with these people?

A. Always at Christmastime we correspond, we send cards; sometimes during the year.

Q. Did you pay any income tax to the Australian Government?

A. The last four months I was there I paid income tax. The agreement in Australia, for foreign personnel working there, is that the first year they exempt you from income tax. The second year they will exempt you if you can show due cause why you

(Testimony of Glenn Weible.)

should remain a second year. But after the second year, then you must pay.

Q. How long did you remain in Australia?

A. Two years and four months.

Q. That would bring you to—when did you leave there? A. October, 1948.

Q. At the operation that you had been sent out to establish, had it been completed or were you called away before its completion?

A. No, it had been completed.

Q. Then what was your next assignment?

A. Canada.

Q. Did you go directly to Canada? [28]

A. I came back to Los Angeles for a period of three weeks, I believe, and then I went to Canada.

Q. You didn't come back alone this time, is that right? A. No.

Q. You came back with whom?

A. I came back with my wife-to-be, actually. We were married here, after we arrived. My present wife is Australian.

Q. Had you met her during your stay in Australia? A. Yes.

Q. Had you become engaged before you left?

A. Yes.

Q. Then you came back, you say, to the United States first. How long were you here?

A. Three weeks.

Q. What did you do during that period?

A. We had a new product which had been developed while I was away. I spent the time becom-

(Testimony of Glenn Weible.)

ing acquainted with the manufacturing of this product and also with the manufacturing of the container, and something on the sales side of the picture. And then I went to Canada to put this product into our manufacturing operation there, as well as some of the others.

Q. Had this product ever been manufactured in Canada? A. No.

Q. At the time you left, or at the time you returned, before you left for Canada, was anything said about the length [29] of stay that you would have in Canada on this assignment? A. No.

Q. Did you fix any definite period, periodic limitation on the time you would be there yourself?

A. No.

Q. Where did you go in Canada?

A. Toronto.

Q. Did you go with the then Mrs. Weible?

A. Yes.

Q. Were your problems in Canada substantially the same as those you have described for Australia? A. That is true.

Q. In your opinion, was it possible at the time you left to fix any definite time in which this assignment could be completed? A. No.

Q. What living arrangements did you make in Toronto? A. We had an apartment.

Q. Did you furnish it yourself?

A. Not the main furniture, but here again we did furnish bedding and china and kitchen utensils, appliances, kitchen appliances.

(Testimony of Glenn Weible.)

Q. Was the apartment furnished with most of these things, dishes, and so on?

A. No, we furnished all of those; we purchased those [30] ourselves.

Q. Did you shop for your own food or did your wife shop?

A. My wife usually did the shopping.

Q. Where did she purchase her food supplies?

A. At the various markets.

Q. The local markets?

A. Local markets.

Q. Was that same thing true in Australia, did you purchase your living supplies at the local markets? A. Yes.

Q. Will you describe the extent of your social life in the Canadian community?

A. Somewhat along the same lines as Australia. We had many Canadian friends. We knew a few more Americans there than we did in Australia due to the fact of being that there are several Americans in Toronto. But I should say 80 per cent of our friends were Canadian.

Q. Did you entertain these friends and did they entertain you?

A. Yes. Most of the entertainment was home entertainment.

Q. Can you make an estimate of how much time in the week was spent in social activity, either with friends or they with you? [31]

A. Perhaps two or three nights a week.

Q. How long did you remain in Canada?

(Testimony of Glenn Weible.)

A. Until July, 1949.

Q. What happened then?

A. I went to England.

Q. Will you describe the circumstances leading to your leaving Canada and going to England?

A. There was a complete reorganization of our British branch and several people from our head office went there at that time to fill in, until we could find and train British personnel to take over. I was one of the people who was selected to go there for this work.

Q. Did you take your wife with you to England?

A. Yes. I went, perhaps, two weeks before she did, but she followed.

Q. What did you do with the household equipment you purchased in Canada?

A. Some of the things we took to England with us. The rest were distributed among friends as gifts.

Q. What things did you take to England, do you recall?

A. There again we took electrical appliances, especially for the kitchen, some heaters, radio, phonograph, some bedding.

Q. At the time that you left for England, did you make any arrangements with Factor's as to how long you would be gone? [32]

A. No.

Q. Any definite time limitation fixed for the length of your stay in England?

A. No.

Q. How long was it intended you stay in England? What was to be the determining factor as to how long you would stay in England?

(Testimony of Glenn Weible.)

A. When the operation began functioning the way we expected it to.

Q. In your opinion was it possible at the time you left to fix any definite time for that period?

A. No.

Q. Was it your intention, when you left, to stay until the job was completed? A. Yes.

Q. How long, in fact, did you stay in England?

A. Until December, 1950.

Q. Were your duties in England the same as the ones you had in Canada and Australia, or did they differ?

A. Very much the same. It was to a great extent a production problem in England, as a branch had already been set up. The factory was in operation, but was not functioning correctly. They were very far behind with orders and production. Therefore, one of the first jobs was to get production up so that we could meet our commitments. [33]

Q. What was your position there in the company ladder?

A. I was in charge of manufacturing.

Q. You were the person in the management in charge of manufacturing? A. Correct.

Q. What living arrangements did you make in England?

A. We had a sort of an apartment in a hotel, but it did have a small kitchen arrangement with it. We did some of our own cooking and part of the meals we took in the hotel.

Q. Was there any reason in particular why you

(Testimony of Glenn Weible.)

didn't rent an apartment, like you had in the other places?

A. It was very difficult to find apartments in England at that time. It served our purpose quite adequately. It was a small neighborhood hotel, not one of the larger ones.

Q. Did you purchase any household or other property in England?

A. Yes, we did purchase china, dishes and some silver, various things of that nature.

Q. Did you have a car there?

A. Yes, we purchased a car, also.

Q. Would you describe again your social activities in England?

A. It was somewhat of the same nature as the other countries. Aside from the Max Factor personnel, we knew no other Americans, they were all English people. [34]

Q. Did you visit and have them visit you in the same manner as before? A. Yes.

Q. Did you make any club affiliations in England?

A. Yes, I belonged to the Poole Harbor Yacht Club, which is more or less of a social club also. This was really not a membership. It was an affiliation. I was allowed to go and use their facilities of the club.

Q. Did you have an account there or did you have to go with a member, or how did that work?

A. No, I was allowed to sign chips, so to speak,

(Testimony of Glenn Weible.)

for drinks or for meals; I had an account which I paid.

Q. Were you free to come and go by yourself?

A. Yes.

Q. How long did you remain in England?

A. 18 months.

Q. Pardon? A. 18 months.

Q. That would make it until when?

A. In December, 1950.

Q. Where did you go at that time?

A. Returned to the United States.

Q. How long were you in the United States?

A. I was here until the 1st of February, and then went to South America. [35]

Q. On a foreign assignment for Max Factor?

A. Yes. I first went to Argentina, and since that time I have lived in Argentina, Chile, Colombia, Brazil.

Q. Since the time you went to Argentina, have you returned to the United States at all?

A. In March, 1953, I was here for two weeks. My mother passed away and I came home.

Q. Were there any other times when you returned? A. No.

Q. Did you learn the language in South America? A. Yes; Spanish and Portuguese.

Q. At any time since you went to work for Max Factor in 1945, have you expressed any limitations as to the length of time you would agree to stay overseas? A. No.

Q. Was it your intent at all times during this

(Testimony of Glenn Weible.)

employment to work in the foreign department, in overseas assignments? A. Yes.

Q. Who prepared your tax return in 1947, do you recall?

A. The accounting department of Max Factor. I believe Mr. Jack Abrams is in charge of the department.

Q. The company withheld part of your salary for payment of federal income taxes during that period, and then in 1948 and '49, also, whose decision to withhold was that?

A. It was the decision of Mr. Michael Harris. [36]

Q. In 1948 and '49, I take it the returns were also prepared by the accounting department?

A. Yes.

Q. And they were sent to you for execution?

A. Yes.

Q. And was the income reported in each of those returns income you received from Max Factor for your services which you have just described while employed in the foreign department?

A. Yes.

Mr. Moss: No further questions.

Cross-Examination

By Mr. McHale:

Q. Mr. Weible, just for our benefit, what does Max Factor manufacture? A. Cosmetics.

Q. I think you stated that when you were in

(Testimony of Glenn Weible.)

Australia you had connections with one club because of some club membership you had in the United States. What club was that in the United States?

A. The Hollywood Athletic Club.

Q. How long did you retain a membership in that club?

A. I had had the membership since 1940, and I retained it until, active membership, into 1952. Now I believe I am considered on the inactive list. [37]

Q. But all during this period of litigation you maintained a membership in the Hollywood Athletic Club?

A. Yes, the latest card I have is 1952.

Q. Were there any other clubs you belonged to in the United States? A. No.

Q. Now, in addition to any personal property which you owned when you left for Australia, did you own any real property, real estate?

A. I had this lot, building site.

Q. That was an unimproved lot? A. Yes.

Q. You stated that, I believe, it was in 1949 that you acquired your former wife's half interest from her. Was it in that lot you acquired that?

A. Yes, I acquired her half interest.

Q. You still own that? A. Yes.

Q. You held that all through this period?

A. Yes.

Q. Where was that lot located?

A. It is in San Fernando Valley, very close to Coldwater Canyon and Ventura Boulevard.

Q. You paid taxes on that lot all this time to

(Testimony of Glenn Weible.)

the County of Los Angeles, City of Los [38] Angeles?
A. Yes.

Q. And have any improvements been made on that lot?
A. No.

Q. Is and was your intention to hold that lot to eventually build a residence there?

A. I have—when it was originally acquired it was my intention to some day build a residence. Now I really don't know what I am going to do.

Q. Was it your intention, when you acquired that half interest from your former wife, so to do?

A. There again I couldn't say. My mind wasn't made up. I offered the lot to her. She didn't want to buy, so I purchased.

Q. How much did you pay for it?

A. \$7,500.00.

Q. Did you pay cash? A. No.

Q. Note or trust deed?

A. I paid by payment through a bank, monthly payments.

Q. Monthly payments? A. Yes.

Q. On a note then? A. Yes.

Q. In Canada, did you pay any Canadian income taxes?
A. No. [39]

Q. Did you pay any in England? A. No.

Q. English taxes? A. No.

Q. Now, with respect to the Australian Government, I believe you testified that you paid income taxes to the Australian Government during the last four months that you were there?
A. Yes.

Q. Now, isn't it true that in order to be ex-

(Testimony of Glenn Weible.)

empted from the payment of the taxes for the earlier years you had to make an application to the Australian Government setting forth your purposes in being in Australia as only of a temporary nature?

A. We had to make an application for—the phrasing of this application, I don't remember.

Q. Did you have to make an application in Canada and England?

A. No. We had to get a work permit in England in order to work, but I don't recall anything in England or Canada having to do with the payment of taxes. I imagine the work permit automatically exempted you from the payment of taxes if you were a foreign person in the country, working to set up operations.

Q. I show you a certified copy of the [40] application.

Mr. McHale: I would like to have this marked for identification.

The clerk: Government's A.

(The document referred to was marked Government's Exhibit A for identification.)

Q. (By Mr. McHale): I show you Government's A, which is a certified copy of the application made under the provisions of the Australian Tax Assessment Act, and ask you if you recall making that application.

A. My recollection isn't this specific one, but

(Testimony of Glenn Weible.)

undoubtedly it is because I certainly made application.

Mr McHale: I offer this as Government's first exhibit.

The Court: It hasn't been identified.

Mr. McHale: Yes, Exhibit A.

The Court: I know, but by the witness there is no foundation.

Mr. McHale: It is a certified copy and carries a certificate, your Honor, of the vice consul.

The Court: I was thinking of the equivocal way in which the witness treated it.

Hand it to the clerk, so I can see the certification. Any objection?

Mr. Moss: It doesn't seem to me that Mr. Weible recalls making one. I don't recall from looking at it, your Honor, whether it is—it is just a type-written signature on there, [41] is it not?

The Court: Yes. Of course, it purports to be a copy. There is a pen and ink signature of a Mr. McGovern, Commissioner of Taxation.

Do you want to examine it? I am wondering whether the certification is sufficient foundation for its admission.

Mr. Moss: Your Honor, the certification by the American Consul certifies that P. S. McGovern, whose true signature is ascribed to the attached document, was the tax collector. It doesn't say it was signed in his presence, and maybe we can assume it is. I have never seen this before, so I just don't know.

(Testimony of Glenn Weible.)

The Court: Well, suppose we just let it remain marked for identification and if you find that there is some basis for ruling it out you can treat that in your brief. You can treat the basis for admitting it, Mr. McHale, because, like counsel, I have never seen it before and it would appear *prima facie* that it is admissible. But I wouldn't be able, without some research, to be certain of it.

Q. (By Mr. McHale): I have the original income tax returns here, Mr. Weible, and I notice that the returns for the years 1948 and 1949 show the name of the taxpayers as Glenn Weible and Patricia Marie Weible, home address 1666 North Highland Avenue. Is that the address of Max Factor?

A. Yes. [42]

Q. The return for 1947, which appears to be a separate return, shows Glenn Weible, address 10427 Moorpark Street, North Hollywood, California. That was your residence?

A. Former address.

Q. Prior to leaving for Australia?

A. Yes.

Q. What was that, an apartment?

A. Apartment, yes.

Q. Did you own any home here in Los Angeles?

A. No.

Q. At any time? A. No.

Q. Did you have an automobile in Australia?

A. No. The company furnished an automobile; it wasn't in my name.

Q. Canada? A. No.

(Testimony of Glenn Weible.)

Q. No automobile there? A. No.

Q. How long were you here in 1948, Mr. Weible? A. Approximately three weeks.

Q. When you went to Australia for the Max Factor Company, I believe you testified you had no definite time in mind for the establishing of this factory. A. No. [43]

Q. However, you did not intend to remain there permanently, did you?

A. That would be difficult to say. We went on an indefinite assignment, and the company never proposed that I remain there permanently. At least, they never discussed it with me, to remain permanently.

Q. You intended to remain in the employment of Max Factor, is that true? A. Yes.

Q. You had no intention of leaving the employment of Max Factor and seeking other employment in Australia? A. No.

Q. The same is true in Canada? A. Yes.

Q. The same is true for England?

A. Yes.

Mr. McHale: That is all.

Redirect Examination

By Mr. Moss:

Q. Just one question, Mr. Weible.

With respect to this membership you retained in the Hollywood Athletic Club, did you pay dues to the Hollywood Athletic Club during the time you were away? A. Yes.

(Testimony of Glenn Weible.)

Q. This was until you dropped the membership in 1952? [44]

A. Became inactive. Actually, I don't recall. The last card I have was '52. I think it became inactive before that and I stopped paying dues.

Q. They sent you cards on this, notifying you when your dues were due?

A. A letter to the effect, when and if I ever came back to the United States to live, then I could pick up the membership again.

Q. That was in 1952 they told you that? I want to make sure from '46 to '52 you paid——

A. As far as I recall. I notice the last card I have was '52. It must have been '52, the last time I paid any dues.

Q. You specifically were paying dues prior to that?

A. There were two types of dues. One, if you were here and used the club, and paid a higher dues. Then if you were out of the country and didn't use the club it was a very small amount you paid monthly.

Finally I stopped paying dues altogether, with the idea of if I ever lived here again I could take up the membership.

Q. When you were away you paid the smaller amount then? A. That is right.

Q. You don't recall what that figure was with respect to the other?

A. Some four dollars a month, something like that, a [45] very small amount.

Mr. Moss: That is all.

Mr. McHale: No further questions.

The Court: They have apparently finished.

(Witness excused.)

The Court: Any other evidence?

Mr. Moss: That is all the evidence, your Honor.

Mr. McHale: All we have, your Honor, is this exhibit we offer in evidence as the Government's A.

There is one thing, the method of computation of the 1947 refund, in case that should become necessary we would need the 1947 income tax return probably in evidence.

However, I notice we have a photostatic copy—I think probably a retained copy—which I am willing to offer in evidence in lieu of the original, since I have no extra copy of the original.

Mr. Moss: That is satisfactory.

Mr. McHale: It is only for the purpose of possible computation.

The Court: It is received.

The clerk: Government's B.

(The document referred to was marked Government's Exhibit B and was received in evidence.)

Mr. Moss: I would like to make a request. I would like to withdraw the first exhibit to photostat it, in order that [46] the plaintiff could have a copy of it.

The Court: Surely. Well, let's see. That gets

into a little difficulty there. That is a document which the Government has offered. Now, it is now in the court's file. If it were one you offered I could very easily allow you to withdraw it for the purpose of photostating. Since it has come in from the other side, I can't give you that privilege with their document.

However, there is a photostat service operated by the Clerk's Office, as part of their clerical function, and they will prepare one for you.

Mr. Moss: I would just as soon arrange it that way. That would be entirely satisfactory.

The Court: You may either do it that way or get a stipulation with Mr. McHale.

Mr. Moss: I will arrange that with Mr. McHale.

The Court: How do you want to present the legal question in this case? Do you want to brief it or want to argue it?

Mr. McHale: Your Honor, may I explain my position here?

The Court: Yes.

Mr. McHale: I didn't anticipate trying this case today. As your Honor knows, I was up in Bakersfield and Fresno last week. Mr. Hochman was to try the case and was called away on an emergency.

I would appreciate a short time, not very long, to [47] prepare some kind of—

The Court: Do you want to supplement that?

Mr. Moss: I thought I would suggest the plaintiff be given a opportunity to file a supplemental brief directed to this point, and maybe one or two

other points. And then the defendant could answer them.

The Court: How long do you want? Take any reasonable time you require. I know you want to get the litigation finished. I don't want you to be working Saturday afternoon.

Mr. Moss: I have another matter that will demand my time for the next two weeks. Could I have three weeks?

The Court: Make it four, if you like.

Mr. Moss: Mr. Weible asked if it would be necessary for him to be here.

No. Three weeks will be fine.

The Court: The plaintiff's opening brief then, which will deal also with the admissibility of Government's A, will be due three weeks from this date.

How long do you want then to answer?

Mr. McHale: Two weeks is ample.

The Court: Two weeks thereafter for the defendant's brief. And if you have comment after that, I suppose you can get it in within a week.

Mr. Moss: Yes. I think we should have it pretty thoroughly briefed. [48]

The Court: One week for the plaintiff's rebuttal.

Mr. McHale: I have a pending offer as to the Exhibit A.

Will it be understood it will be admitted, subject to motion to strike, or how will you handle it?

The Court: The court will rule on the admission or rejection of the document at the time that it rules upon the main case.

Mr. McHale: Very well, your Honor.

The Court: Is that acceptable to you?

Mr. McHale: That is acceptable.

Mr. Moss: That is fine.

The Court: Anything further?

Mr. Moss: No.

Mr. McHale: That is all.

The Court: You managed to conclude your case just three minutes before the judges' meeting.

Mr. Moss: We are a little faster than we thought we would be, your Honor.

(Whereupon, at 3:30 o'clock p.m., Monday, January 9, 1956, the case was submitted.) [49]

Certificate

I, Virginia K. Wright, hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above-entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 18th day of May, A.D. 1956.

/s/ VIRGINIA K. WRIGHT,
Official Reporter.

[Endorsed]: Filed May 23, 1956. [50]

DEFENDANT'S EXHIBIT A

Commonwealth of Australia

Please quote this No. in your reply.

J.67/24 Pt. 7

Federal Taxation Office

Canberra, A.C.T.

24th June, 1954.

Eldon P. King, Esq.,

Director,

International Tax Relations Division,

Bureau of National Revenue,

Washington 25. U.S.A.

Dear Mr. King:

Since I wrote to you on 2nd October, 1953, concerning Mr. Glenn Berlin Weible, I have found that it is not practicable for the Secretary of the Department of National Development to supply you with a copy of documents relating to Mr. Weible.

As the Income Tax Convention between the United States and Australia has now become effective, I am enclosing a statement relating to the Australian taxation position in respect of remuneration derived by Mr. Weible during his stay in Australia.

I trust that this statement contains the information required by you.

With kind regards,

Yours sincerely,

/s/ P. S. McGOVERN,

Commissioner of Taxation.

[Stamped]: Received June 28, 1954.

Commonwealth of Australia,
State of New South Wales,
City of Sydney,
Consulate General of the
United States of America—ss.

I, Harry J. Mullin, Jr., Vice Consul of the United States of America at Sydney, Australia, duly commissioned and qualified, do hereby certify that P. S. McGovern, whose true signature is subscribed to the attached document, was on the eleventh day of June, 1954, the day of the date thereof, Commissioner of Taxation for the Commonwealth of Australia at Canberra in the Australian Capitol Territory in the Commonwealth of Australia, duly commissioned and qualified, to whose official acts full faith and credit are due.

In Witness Whereof I have hereunto set my hand and the seal of the Consulate General of the United States of America at Sydney, Australia, this fifteenth day of June, 1954.

[Seal] /s/ HARRY J. MULLIN, JR.,
Vice Consul of the United
States of America.

Service No.:

Item No.: 38

No fee prescribed.

[Stamped]: 10559.

Commonwealth of Australia

Federal Taxation Office
Canberra, A.C.T.

Statement for Commissioner of Internal Revenue
Washington, D. C.
United States of America

This statement relates to Mr. Glenn Berlin Weible at one time living at 96 Elizabeth Bay Road, Elizabeth Bay, New South Wales, Australia.

2. Sub-paragraph (vii) of paragraph (c) of Section 23 of the Income Tax Assessment Act 1936-1946 required exemption from income tax to be granted in respect of income derived—

“as director’s fees, salary or wages by a non-resident, during a visit to Australia during which he acts as a director, manager or other administrative officer of, or is employed as a consultant, technician or operative in, a manufacturing, mercantile or mining business or a business of primary production, being income—

“(1) derived during—

“(A) the first year of the visit; or

“(B) the second year of the visit if the Secondary Industries Commission of the Department of Post-war Reconstruction certifies, and the Treasurer is satisfied, that the retention of the non-resident’s services in Australia beyond

the first year will assist or has assisted in the development of Australian industry; and

“(2) which is not exempt from income tax in the country where the non-resident is ordinarily resident.”

A corresponding exemption from social services contribution imposed by the Social Services Contribution Assessment Act 1945-1946 was also granted.

3. Mr. Weible stated that he arrived in Australia on 15th June, 1946. By reason of the provisions referred to above, he was granted exemption from income tax and social services contribution during that first year of his visit to Australia.

4. For the purposes of obtaining exemption from income tax and social services contribution during the second year of his visit to Australia, Mr. Weible completed and filed an application as follows:

Commonwealth of Australia

Income Tax Assessment Act 1936-1946:
Section 23(c)(vii)

Application for Certificate from Secondary
Industries Commission

(a) I (full name) Glenn B. Weible being a non-resident of Australia at present living at Flat 26, 96 Elizabeth Bay Road, Sydney, hereby make ap-

plication for a certificate to be issued by the Secondary Industries Commission under Section 23, sub-section (c), paragraph (vii) of the Income Tax Assessment Act 1936-1946.

I certify that the following information concerning me is correct to the best of my knowledge and belief.

Usual place of residence of applicant: United States of America.

Occupation of applicant: Chemical Engineer.

Name of employer or client: Max Factor & Co. (Incorporated U.S.A.). Registered in New South Wales as Foreign Company.

Address of employer or client: Sydney Branch Registered Office, 11-25 Palmer Street, East Sydney.

Nature of applicant's duties while in Australia: To train local chemists in application of formulae and manufacturing operations in formulating products.

Relevant qualifications: Graduate of University of Missouri, U.S.A. Chief Chemist (Paint and Lacquers) for Lockheed Aircraft Corporation.

Date of arrival in Australia: 15th June, 1946.

Date of departure (Anticipated): November, 1947.

Reasons for visit to Australia extending beyond twelve months: Completion of itinerary within twelve months was prevented owing to delay in obtaining imported plant and machinery, caused by

overseas shipping strikes, further delay in installation in Australia due to lack of raw materials and shortage of labour, and commencement of operations also delayed through shortage of essential materials, including containers.

Date: 2nd May, 1947.

/s/ GLENN B. WEIBLE.

Note: The above information should be as full as possible; otherwise it may not be practicable either for the Commission to issue the required certificate or for the Treasurer to be satisfied as required by the Act that the retention of the non-resident's services in Australia beyond the first year will assist or has assisted in the development of Australian industry. Where possible this application should be supported by a statement by the taxpayer's employer or client corroborating and if possible amplifying the information given by the applicant.

(a) This form should be completed by the person, who is seeking the benefit of Section 23(c)(vii). Where such person has left Australia it may be completed on his behalf by his employer or client in Australia.

5. On 7th July, 1947, the Secretary to the Secondary Industries Commission gave a certificate in the following form:

Commonwealth of Australia

Income Tax Assessment Act 1936-1946

Section 23(c)(vii)

Certificate

The Secondary Industries Commission certifies that the retention of the services of Glenn B. Weible in Australia, as Chemical Engineer employed by Max Factor & Co. (Registered in New South Wales as Foreign Company), 11-25 Palmer Street, East Sydney, New South Wales, beyond the fifteenth day of June, 1947, has assisted in the development of Australian industry.

For and with the authority of the Secondary Industries Commission.

/s/ J. L. KNOTT,
Secretary.

Dated the 7th day of July, 1947.

6. The then Treasurer was satisfied that the retention of Mr. Weible's services in Australia beyond the first year of his visit would assist in the development of Australian industry and income derived by Mr. Weible for the period from 15th June, 1947, to 14th June, 1948, was exempt from income tax and social services contribution by reason of the provisions of the law referred to above.

7. Remuneration derived by Mr. Weible in the period from 15th June, 1948, to 30th June, 1948, was regarded as income having its source in Australia

and as being assessable income. The amount of the income was insufficient to give rise to a liability for income tax or social services contribution.

8. Mr. Weible left Australia on or about 9th October, 1948, and remuneration derived by him in the period from 1st July, 1948, to 9th October, 1948, was regarded as income having its source in Australia. Exemption from Australian tax was not claimed in respect of that income, which was subjected to income tax and social services contribution.

/s/ P. S. McGOVERN,
Commissioner of Taxation.

Canberra, 11th June, 1954.

Received June 28, 1954.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, John A. Childress, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered 1 to 33, inclusive, contain the original

Complaint;

Answer; Request for Additional and for Amendments to Findings;

Findings of Fact and Conclusions of Law and Judgment;

Notice of Appeal;

Designation of Contents of Record on
Appeal;

which, together with defendant's Exhibit A and 1 volume of reporter's transcript of proceedings had on January 9, 1956, constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above-entitled case.

I further certify that my fees for preparing the foregoing record amount to \$2.00, which sum has been paid by appellant.

Witness my hand and the seal of the said District Court this 1st day of June, 1956.

[Seal] JOHN A. CHILDRESS,
Clerk;

By /s/ CHARLES E. JONES,
Deputy.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, John A. Childress, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered 1 to 7, inclusive, contain the original

Plaintiffs' Supplemental Memorandum;
Supplement to Designation of Contents of
Record on Appeal;

in the above-entitled cause, which constitute the supplemental transcript of record on appeal in the above-entitled case.

I further certify that my fees for preparing the foregoing record amount to \$1.20, which sum has been paid by appellant.

Witness my hand and seal of the said District Court this 10th day of July, 1956.

[Seal] JOHN A. CHILDRESS,
Clerk;

By /s/ CHARLES E. JONES,
Deputy.

[Endorsed]: No. 15150. United States Court of Appeals for the Ninth Circuit. Glenn Weible and Patricia Weible, Appellants, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed June 4, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 15150

GLENN WEIBLE and PATRICIA WEIBLE,
Appellants,

vs.

UNITED STATES,
Appellee.

STATEMENT OF POINTS

I.

Statement of Points

The points upon which appellants (plaintiffs) intend to rely on appeal are:

1. The court erred in its conclusion of law (Conclusions of Law, Paragraph II) that appellant (plaintiff) Glenn Weible, was not a bona fide resident of Australia for the calendar year 1947 within the meaning of Section 116 of the Internal Revenue Code of 1939, and that therefore the earnings of Glenn Weible from Max Factor & Company for said year were taxable.

2. The court erred in its conclusion of law (Conclusions of Law, Paragraph III) that appellants (plaintiffs) Glenn Weible and Patricia Weible were not bona fide residents of Australia or Canada during the calendar year 1948 within the meaning

of Section 116 of the Internal Revenue Code of 1939, but were residents of the United States, and that therefore the earnings of Glenn Weible from Max Factor & Company for said year were taxable.

3. The court erred in its conclusion of law (Conclusions of Law, Paragraph IV) that appellants (plaintiffs) Glenn Weible and Patricia Weible were not bona fide residents of Canada and England in 1949, within the meaning of Section 116 of the Internal Revenue Code of 1939, but were residents of the United States, and that therefore the earnings of Glenn Weible from Max Factor & Company for said year were taxable.

4. The court erred in Paragraph X of its Findings of Fact to the extent that it failed to find that appellant, Glenn Weible, changed his membership in the Hollywood Athletic Club to an inactive membership during the years involved.

5. The court erred in Paragraph XI of its Findings of Fact to the extent that it failed to find that pursuant to his agreement with Max Factor & Company appellant, Glenn Weible, and his employer agreed that he would remain continuously outside of the United States in the performance of his duties except for short periods of training and consultation.

6. The court erred in Paragraph XII of its Findings of Fact to the extent that it failed to find that no definite time was set by either Glenn Weible or his employer for the completion of Weible's

assignment in Australia, because they were unable to predict how long it would take, and that Weible agreed to remain in Australia until the assignment was completed.

7. The court erred in Paragraph XIV of its Findings of Fact to the extent that it failed to find that while in Sydney, Australia, Weible frequented a local club and actively entered into social life in Sydney, and that his friends and acquaintances were predominantly Australians.

8. The court erred in receiving appellee's (defendant's) Exhibit "A" into evidence; or in the alternative the court erred in Paragraph XV of its Findings of Fact to the extent of its finding that Glenn Weible secured exemptions from the Australian income tax laws by filing with the Australian government a statement that he was a non-resident of Australia, that his usual place of residence was the United States of America, and that he anticipated leaving Australia in November, 1947.

9. The court erred in Paragraph XVII of its Findings of Facts to the extent that it failed to find that no definite time was fixed by Weible or his employer for the length of his stay in Canada, but that Weible agreed to stay as long as necessary to accomplish his assignment in Canada.

10. The court erred in Paragraph XVIII of its Findings of Fact to the extent that it failed to find that during the years involved Weible intended to

remain abroad for an indefinite period in the foreign service of Max Factor & Company.

Dated: June 15, 1956.

THOMPSON, ROYSTON,
WIENER & MOSS,

By /s/ CONRAD J. MOSS,
Attorney for Appellants and
Plaintiffs.

Affidavit of Service by Mail attached.

[Endorsed]: Filed June 18, 1956.